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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 107

SEVEN-UP BOTTLING COMPANY OF LOS ANGELES,
INC.,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CLAIMS AND BRIEF IN SUPPORT
THEREOF.

✓ ROGER ROBB,

✓ BURR TRACY ANSELL,

Counsel for Petitioner



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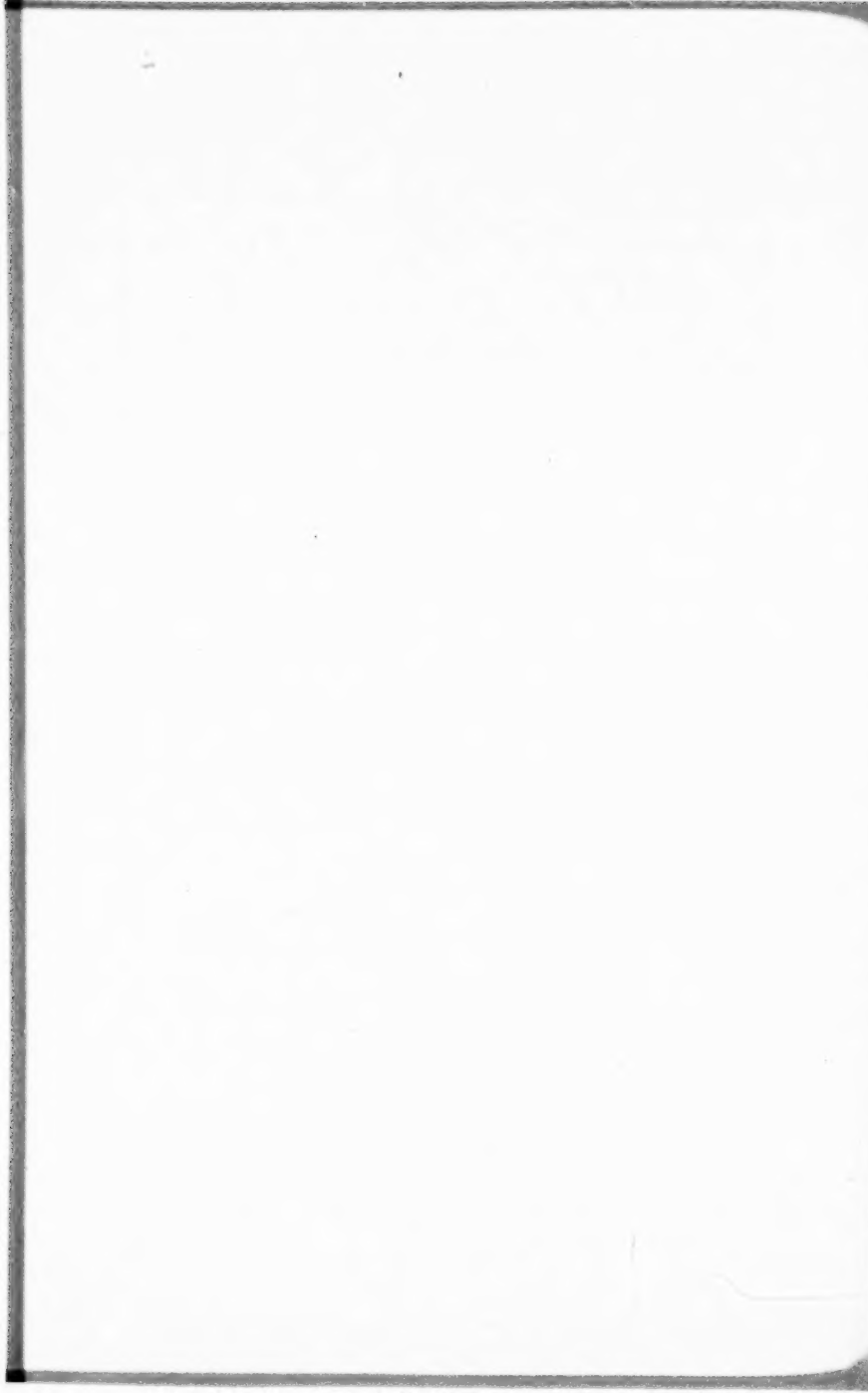
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SUPREME COURT OF THE UNITED STATES

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No. 107

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INC.,

Petitioner,

vs.

THE UNITED STATES

**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CLAIMS**

The petitioner prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in this case December 2, 1946.

Opinion Below

The opinion of the Court of Claims (R. 5) is not yet reported.

Jurisdiction

The judgment of the Court of Claims sought to be reviewed was entered December 2, 1946 (R. 7). A motion by the petitioner for a new trial was overruled March 3, 1947 (R. 7). The jurisdiction of this Court is invoked

under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

Questions Presented

1. Whether, in determining what constituted just compensation to the owner of a vessel requisitioned and taken by the United States on February 1, 1942, pursuant to the Merchant Marine Act, 1936, as amended, the Court of Claims was correct in adopting, as the measure of fair compensation for the taking of the vessel, her "fair market value" on February 1, 1942, when the evidence showed and the Court of Claims correctly found that there was no market for such vessels on February 1, 1942.

2. Whether, having correctly found that because of war conditions there was no market for such vessels on February 1, 1942, the date when the petitioner's vessel was requisitioned, the Court of Claims committed error in failing to determine the fair measure of compensation to which the petitioner was entitled upon the basis of the original cost of the vessel, the amount of insurance carried upon the hull, the book cost, the replacement cost, the replacement cost depreciated, the value of the vessel calculated upon the basis of the purchase price of the vessel and improvements depreciated, the fair market value of the vessel just prior to December 7, 1941, and the market value on the first date subsequent to December 7, 1941, when there was a market for vessels of this type.

Statutes Involved

The Merchant Marine Act, 1936, 49 Stat. 1985, as amended by the Act of August 7, 1939, 53 Stat. 1254, 46 U. S. C. A. 1242, provides in part:

Sec. 902. (a) Whenever the President shall proclaim that the security of the national defense makes it ad-

visible or during any national emergency declared by proclamation of the President, it shall be lawful for the Commission to requisition or purchase any vessel or other watercraft owned by citizens of the United States, or under construction within the United States, or for any period during such emergency, to requisition or charter the use of any such property. The termination of any emergency so declared shall be announced by a further proclamation by the President. When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use.

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(d) In all cases, the just compensation authorized by this section shall be determined and paid by the Commission as soon as practicable, but if the amount of just compensation determined by the Commission is unsatisfactory to the person entitled thereto, such person shall be paid 75 per centum of the amount so determined and shall be entitled to sue the United States to recover such further sum as, added to said 75 per centum will make up such amount as will be just compensation therefor, in the manner provided for by section 24, paragraph 20, and section 145 of the Judicial Code (U. S. C., 1934 edition, title 28, secs. 41, 250).

Statement

This is an action to recover just compensation for the schooner yacht *Geoanna*, owned by the petitioner, which was requisitioned by the United States Maritime Commission pursuant to the Merchant Marine Act, 1936, 49 Stat. 1985, as amended by the Act of August 7, 1939, 53 Stat. 1254, 46 U. S. C. A. 1242.

The *Geoanna* was requisitioned on February 1, 1942 (Findings of Fact No. 2, R. 4). On June 2, 1942, the War

Shipping Administration determined the sum of \$20,000 to be just compensation for the *Geoanna* and offered to pay the petitioner such sum as such compensation (R. 75). On March 2, 1943, petitioner rejected the offer as not representing just compensation for the vessel. Thereafter the government paid to the petitioner the sum of \$15,000, tendered and received as 75 per cent of the amount theretofore administratively determined to be and offered as just compensation (Finding of Fact No. 4, R. 4-5). Pursuant to the statute, this suit followed, to recover such further sum as, added to the \$15,000, would make up an amount representing just compensation (46 U. S. C. A. Sec. 1242 (d)).

The yacht *Geoanna* was a steel schooner, 112 feet long over-all, 22.5 feet beam, 14 feet draft, with auxiliary power, built in 1934, and acquired by the petitioner from the original owner (who was also the designer and builder) in 1938. The design and construction of the vessel were sound, and at the time of the taking she was seaworthy, capable of navigating any ocean, fully equipped, and in all respects in very good condition (Finding of Fact No. 3, R. 4).

The evidence showed, and the Court of Claims correctly found, that "While there was a market for vessels of this type prior to Pearl Harbor, the restrictions which the Government placed on the use of waters after December 7, 1941, were such that there were practically no commercial sales after that time and therefore no well-established market" (R. 6). Recognizing the futility of attempting to establish a "market value" of the vessel on the date of taking, in the absence of any market at that time, the petitioner introduced the following evidence as to the fair and reasonable value of the *Geoanna* on February 1, 1942:

1. The cost of the vessel to the petitioner was \$68,452.65. This amount represented the original purchase price of \$60,000, paid by the petitioner for the vessel

in 1938, plus the cost of certain improvements and additional equipment installed by the petitioner (Opinion, R. 6; R. 22-25; Plaintiff's Exhibit 23, R. 79).

2. The hull of the *Geoanna* was insured for \$80,000 (R. 27).

3. Although records reflecting the original cost of the *Geoanna* were unavailable, two well-qualified expert witnesses, Fellows and Barrie, testified that her original cost was approximately \$125,000 (R. 32, 73).

4. Mr. Fellows, Mr. Barrie, and a third well-qualified expert, Mr. Young, fixed the replacement cost of the vessel on February 1, 1942, at between \$160,000 and \$187,500 (Fellows, R. 33, 34, "between \$160,000 and \$170,000; Barrie, R. 73, approximately \$187,500; Young, R. 20, \$162,500).

5. Mr. Young testified that the replacement cost, depreciated, of the *Geoanna* on February 1, 1942 was approximately \$107,000 (Young, R. 20). Mr. Barrie's estimate of replacement cost depreciated was \$105,000 (Barrie, R. 73).

6. Mr. Barrie testified that the "market value" of the *Geoanna* on February 1, 1942, calculated upon the basis of the purchase price of the vessel and improvements, depreciated, was \$56,000 (Barrie, R. 73).

7. Mr. Fellows testified that the fair market value of the *Geoanna* just prior to December, 1941, was approximately \$80,000 (Fellows, R. 32); and that sixteen months after Pearl Harbor she could have been sold for \$60,000 or \$65,000, for commercial use (R. 32,33).

To establish the fair and reasonable value of the *Geoanna* on February 1, 1942, the Government relied upon the opinions of yacht brokers and naval architects as to the market value of the vessel. Five of these witnesses testified that on February 1, 1942, the market value of the vessel was \$30,000 (Rigg, R. 42, 43; Payne, R. 50; Howard, R. 53; Alden, R. 64; Hodges, R. 59). One Government witness,

a naval architect, testified that in his opinion the "value" of the *Geoanna* on February 1, 1942, was "about \$32,000" (Mabry, R. 62). *Three of these witnesses, Messrs. Rigg, Payne and Howard, had been members of the Government's Appraisal Committee," consisting of five men, that on May 26, 1942 had determined that the fair and reasonable value of the Geoanna on February 1, 1942, was \$20,000* (Moran, R. 37, 38; Rigg, R. 40, R. 75)). On behalf of the Maritime Commission, Mr. Rigg had signed the letter offering the plaintiff \$20,000 as just compensation for the *Geoanna* (Plaintiff's Exhibit 20, R. 75). No explanation was given or suggested for the change in the opinion of these witnesses as to the fair and reasonable value of the vessel.

Notwithstanding the fact that there was no market for such vessels on the date when the *Geoanna* was requisitioned, the Government offered no evidence as to the original cost, replacement cost, or any other factor touching the value of the vessel except the factor of "market value," as testified to by the defendant's expert witnesses. *There was no evidence of a contemporary sale of any vessel comparable to the Geoanna*; in fact, the only evidence as to the sale of any other vessel claimed to be comparable to the *Geoanna* was the testimony of Mr. Rigg that in 1939 he sold the schooner *Valor*, a "better" boat than the *Geoanna*, for \$40,000 (R. 47).

The Court of Claims held (R. 6):

In arriving at the fair and reasonable value of the *Geoanna* on February 1, 1942, we must take into consideration the conditions that prevailed and the intrinsic value of the vessel. *Illinois Pure Aluminum Co. v. The United States*, 107 C. Cls. —, decided October 7, 1946.

We find the fair and reasonable value of the vessel on that date to be \$30,000. This is in accord with the testimony of those witnesses who were more experi-

enced and were in a position to be best informed on such facts.

Specification of Errors to Be Urged

The Court of Claims erred:

1. In adopting the "market value" of the *Geoanna* as a measure of fair compensation for the taking of the vessel on February 1, 1942, when there was no market for such vessels on that date.
2. In failing to give proper consideration and weight to the evidence of fair and reasonable value introduced by the petitioner.
3. In finding that the fair and reasonable value of the *Geoanna* on February 1, 1942, was \$30,000.
4. In finding that when the cost of maintaining the *Geoanna* for the probable war period, plus the cost of replacements, upkeep and depreciation, were subtracted from the market value of the vessel just prior to December 7, 1941, the result was \$30,000.

Reasons for Granting the Writ

The rule adopted by the court below, to determine the fair and reasonable value of the *Geoanna*, is in conflict with applicable decisions of this Court, and with the decisions of circuit courts of appeals on the same matter. The question involved is one of great importance.

1. There was no open market for a vessel such as the *Geoanna* on February 1, 1942, the date when she was requisitioned. This the opinion of the court below recognized.¹

¹ "While there was a market for vessels of this type prior to Pearl Harbor, the restrictions which the Government placed on the use of waters after December 7, 1941, were such that there were practically no commercial sales after that time and therefore no well-established market" (R. 6).

Yet the court adopted, as the measure of fair compensation for the taking of the vessel, her "fair market value" as fixed by the Government's witnesses. The court emphasized its adherence to the "market value test" by its consideration of the value that might have been placed upon the vessel by "anyone purchasing her" at the time of her requisition.² This application of the "market-value" formula in the absence of a market is in conflict with a long line of decisions by this Court and by circuit courts of appeals. These decisions establish that, while the market price may be the fairest test of the value of a commodity commonly bought and sold, when the normal conditions of competition have full play, this test fails, and should not be applied if, because of unusual conditions, there was no market at the time in question.

Standard Oil Company v. Southern Pacific Company,
268 U. S. 146;

The Cushing, 285 Fed. 617 (D. C. S. D. N. Y. 1922);

The Cushing, 292 Fed. 560 (C. C. A. 2, 1923);

The Hisko, 54 F. (2d) 540 (C. C. A. 2, 1931);

Leonard v. Whitwill, 19 Fed. 547 (D. C. S. D. N. Y. 1884);

The President Madison, 91 F. (2d) 835 (C. C. A. 9, 1937);

The Black Eagle, 87 F. (2d) 891 (C. C. A. 2, 1937);

Causey v. Cottman Co., 12 F. (2d) 558 (C. C. A. 4, 1926);

² "If the Government had not requisitioned the vessel it would have been compelled to remain largely in a lay-up status during the period of the war. . . . Anyone purchasing her would have been compelled to take these facts into consideration. If, therefore, we were to accept the testimony of plaintiff's witnesses as to the market value just prior to December 7, 1941, anyone purchasing her would have necessarily subtracted the crew cost of maintaining the vessel for the probable war period, plus replacements, upkeep and depreciation" (R. 6). (Italics supplied.)

The Manhattan, 10 F. Supp. 45 (D. C. E. D. Penn., 1935), affirmed 85 F. (2d) 427 (C. C. A. 3), cert. den. 300 U. S. 564;

The Samson, 217 Fed. 344 (C. C. A. 9, 1914);

Rodi v. Dean, 138 F. (2d) 309 (C. C. A. 7, 1943);

The H. F. Dimock, 77 Fed. 226 (C. C. A. 1, 1896);

The Cayuga, Fed. Cas. No. 2535 (D. C. N. Y.), affirmed Fed. Cas. No. 2537, affirmed 14 Wall. 270;

The Granite State, 70 U. S. 310.

In other words, where there is no market to give validity to the "market-value test," valuation must be fixed upon the basis of evidence such as that adduced by the petitioner in this case. In adopting the market-value formula, and in failing to determine valuation upon the basis of the petitioner's evidence, the court below committed a fundamental error.

2. In considering the value that might have been placed upon the vessel by "anyone purchasing her" at the time of her requisition, the court below has attributed to the hypothetical purchaser the knowledge of facts which did not exist at the time of requisition. These facts were the length of the war period and the duration and extent of governmental restrictions upon the use of vessels by private owners.³ Such a theory of valuation is fallacious; indeed,

³ The court said (R. 6):

"If the Government had not requisitioned the vessel it would have been compelled to remain largely in a lay-up status during the period of the war. While she was in this status a skeleton crew at a cost of \$575 a month would have been required to care for the vessel. Then, too, it was necessary to incur painting and other upkeep expense, and there would necessarily have been some depreciation. Anyone purchasing her would have been compelled to take these facts into consideration. If, therefore, we were to accept the testimony of plaintiff's witnesses as to the market value just prior to December 7, 1941, anyone purchasing her would have necessarily subtracted the crew cost of maintaining the vessel for the probable war period, plus replacements, upkeep and depreciation. This course would arrive at substantially the same result."

if it were carried to its logical conclusion, a prolongation of the war must finally have resulted in a finding by the court below that the *Geoanna* was worthless on February 1, 1942.

(a) Moreover, in attempting to compute the value of the vessel upon this theory, the court erroneously assumed that, if the vessel had remained "in a lay-up status during the period of the war", "a skeleton crew at a cost of \$575 a month would have been required to care for the vessel." This assumption by the court was based upon the completely erroneous notion that a skilled crew would have been required to maintain the vessel while she was laid up; whereas the fact was, and the record showed (R. 15, 16) that one caretaker would have been enough.

Conclusion

For the foregoing reasons we respectfully submit that this petition for a writ of certiorari should be granted.

Respectfully submitted,

ROGER ROBB,
BURR TRACY ANSELL,
Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 107

SEVEN-UP BOTTLING COMPANY OF LOS ANGELES,
INC.,

Petitioner,

vs.

THE UNITED STATES

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI**

Opinion of the Court Below, Jurisdiction of the Court, Questions Presented, Statutes Involved, Statement of the Case, and Specification of Errors to Be Urged

Reference to the opinion of the Court of Claims is made in the Petition, *ante* p. 1. A statement of the grounds on which the jurisdiction of this Court is invoked is also contained in the Petition, *ante* pp. 1-2. A statement of the questions presented is contained in the Petition, *ante* p.

2. The statutes involved are set out in the Petition, *ante* pp. 2-3. A statement of the case is contained in the Petition, *ante* pp. 3-7. A specification of errors to be urged is contained in the Petition, *ante* p. 7. Accordingly, these matters are not set forth in this brief.

Argument

Having stated the theory of the petitioner's case, with supporting authorities, in connection with the discussion of the reasons for granting the writ, *ante* pp. 7-10, counsel did not deem it necessary to file a brief in support of the Petition for Certiorari. But subsequent to April 17, 1947, when the Petition was filed with the Court of Claims pursuant to Rule 99 (b) of that Court, two decisions of the Court of Claims came to the attention of counsel which, in the opinion of counsel, clearly demonstrate the unsoundness of the decision in the case at bar. These cases are *Kendall v. United States*, No. 46199, decided by the Court of Claims April 7, 1947, and *Turkington v. United States*, No. 46273, decided by the Court of Claims May 5, 1947. It appears that Rule 99 (b) of the Court of Claims is designed so as to prevent the revision of the Petition at this time to include a discussion of these cases; and, accordingly, petitioner files this brief.

Kendall v. United States was a suit to recover just compensation for the vessel *Gene*, which was requisitioned from Kendall on February 1, 1943. The *Gene* was a wooden houseboat, 73.5 feet long. She was built in 1929 at a cost of \$37,895. In 1938, she was destroyed above deck by fire which also seriously damaged the quarters below deck, although the hull and some of her machinery remained intact. She was purchased by Kendall after the 1938 fire for \$4,100, and he expended approximately \$26,000 in her reconstruction, making her total cost to him \$30,100. The

court found that her reproduction cost on February 1, 1943, the date of requisition, was \$47,000. Her hull on that date was insured for \$40,000. The court found that her market value prior to December 7, 1941, was \$15,000. At the time of her requisition, the hull was dry-rotted to such an extent that shortly after requisition it was necessary to renew one-fourth of the hull planking and recaulk the entire bottom. The Court of Claims found that at the time of requisition, "there was no market value for the *Gene* to which we can look to determine what would be just compensation." In the absence of market value, the court said: "We look therefore to her cost, her condition, what her market value was when last there was a market, the trend of prices upward at the time the market was restricted by the war, the fact that, constructed as she was, she was usable for commercial purposes." Applying this method of valuation to the facts, the court found that \$25,000 was the value of the *Gene* on the date of her requisition. In other words, the court applied the method of valuation for which the petitioner in the case at bar unsuccessfully contended. We think it clear that the decision in this case is completely irreconcilable with the decision of the same court in the case at bar.

The conflict between the decision in the *Kendall* case and that in the case at bar is strikingly shown by the following comparison of the *Gene* and the *Geoanna*:

| | <i>Gene</i> | <i>Geoanna</i> |
|--|---------------------|----------------------------------|
| Type | Cruising houseboat | Auxiliary schooner |
| Date when built | 1929 (rebuilt 1938) | 1934 |
| Length | 73.5 feet | 112 feet |
| Beam | 16 feet | 22.5 feet |
| Draft | 6.3 feet | 14 feet 9 inches |
| Power | Diesel | Diesel and Sail |
| Hull | Wood | Steel |
| Range | Inland waters | Any ocean |
| Usable for commercial purpose? | Yes | Yes |
| Original cost | \$37,895 (1929) | \$120,000 (1934) ¹ |
| Cost to owner | \$30,100 (1938) | \$68,452.65 (1938-39) |
| Date when requisitioned | Feb. 1, 1943 | Feb. 1, 1942 |
| Condition when requisitioned | 1/4 hull dry-rotted | Very good |
| Reproduction cost when requisitioned | \$47,000 | \$160,000-\$165,000 ² |
| Hull insurance carried ("present value") | \$40,000 | \$80,000 ² |
| Market value before Dec. 7, 1941 | \$15,000 | \$80,000 ² |
| Market for vessel when requisitioned | None | None |
| Fair value per Court of Claims | \$25,000 | \$30,000 |

¹ The Court of Claims found that the original cost of the *Geoanna* was \$120,000, although the plaintiff's evidence (*ante* p. 5) showed an original cost of \$125,000.

² The court below refused to make findings upon these subjects although it was requested to make such findings upon the basis of substantial evidence in the record, and although it properly found in the *Kendall* case that these matters were pertinent to a determination of "fair value" in the absence of market value.

In summary, the Court of Claims assumed in each of these cases to determine the fair value of a pleasure vessel under conditions where market value was lacking. It concluded in the case of the *Gene* that her fair value was 83% of her cost to the owner after five years, while in the case of the *Geoanna*, in better condition than the *Gene*, the court

concluded that her value was only 44% of her cost to the owner after only four years. In the case of the *Gene*, the court found that her fair value was 62% of her hull insurance or "present value." The court made no finding as to the hull insurance or "present value" of the *Geoanna*, although the uncontradicted evidence showed that it was \$80,000. The "fair value" of the *Geoanna*, as found by the court, was only 37½% of the amount of the hull insurance.

These comparisons speak for themselves, and we think that no further argument is necessary to demonstrate the eccentricity of the decision in the case at bar, both as to the method of valuation employed and as to the valuation found.

Turkington v. United States involved the valuation of the tugboat *Pacific*, requisitioned on February 29, 1944. The *Pacific* was a wooden tugboat, 70 feet long, built in 1903. The court found that her reproduction cost on October 1, 1941, was \$51,505. On the date of requisition her "present value" for insurance purposes was \$25,100. The court found that the fair value of this old tugboat on the date of requisition was \$25,000.

We submit that the foregoing cases demonstrate that the decision of the Court of Claims in the case at bar is fundamentally inconsistent with other decisions of that court.

Conclusion

For the foregoing reasons we respectfully submit that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ROGER ROBB,
BURR TRACY ANSELL,
Attorneys for Petitioner.